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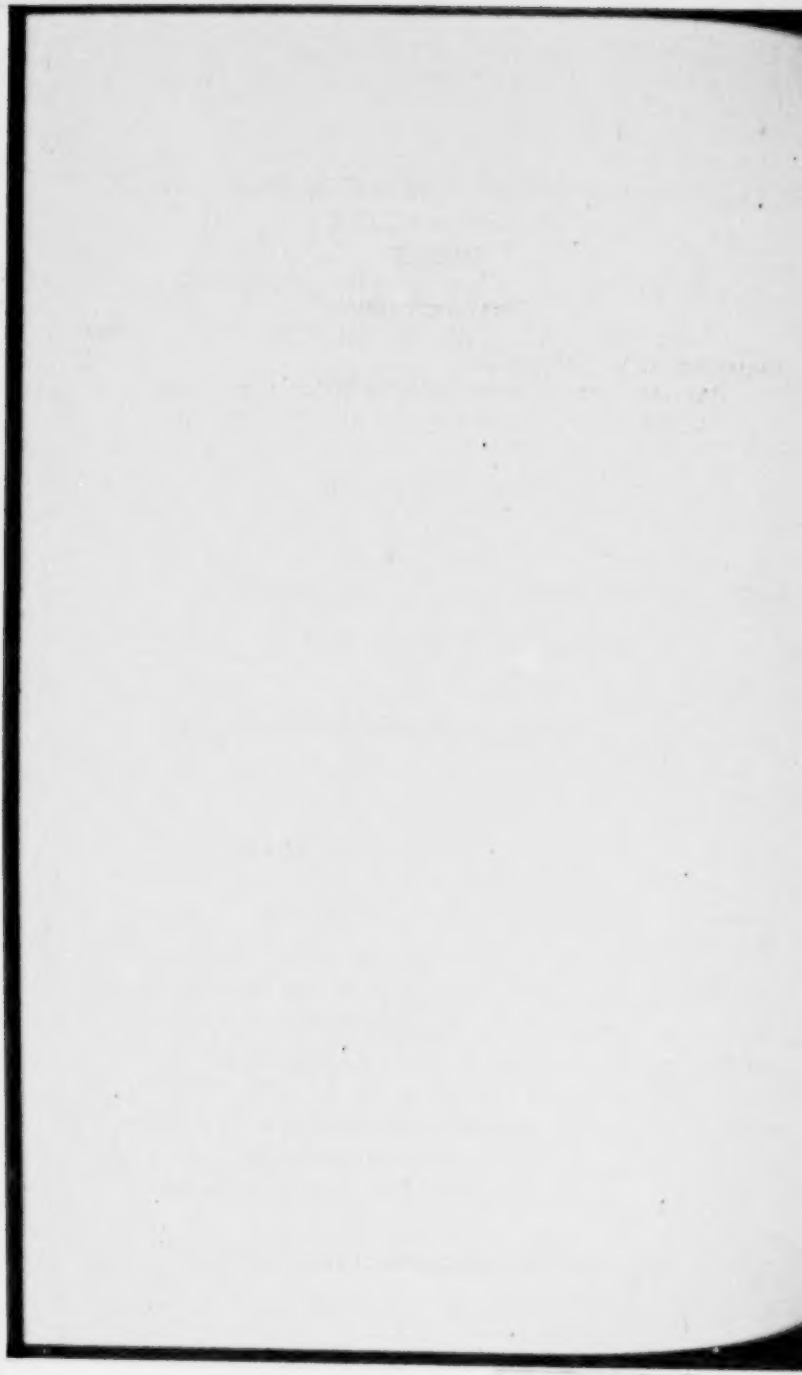

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Jurisdictional Statement Filed in U. S. District Court, September 25, 1948

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

Civil Action No. 834

BRADY TRANSFER & STORAGE COMPANY, ET AL.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.,
Defendants

JURISDICTIONAL STATEMENT

The jurisdiction of the Supreme Court of the United States in this appeal is conferred by the Deficiencies Appropriation Act of October 22, 1913, 38 Stat. 220, Section 210 of the Judicial Code (28 U. S. C. A. 47a), and Section 238 of the Judicial Code (28 U. S. C. A. 345). The decree appealed from was entered on September 3, 1948, and this petition for appeal is presented on September 25th, 1948.

This is a suit to set aside and enjoin an order of the defendant, Interstate Commerce Commission, entered February 3, 1947, wherein defendant ordered plaintiff to cease

and desist from unspecified motor carrier operations which the Commission held to be unauthorized. This court has ruled upon final hearing that the complaint shall be dismissed on the merits. The foregoing statute provides in such cases for a direct appeal to the Supreme Court of the United States from any decision of a District Court of three judges. *United States* v. *Carolina Freight Carriers Corp.* (1942), 315 U. S. 475, 477.

The questions involved are substantial and novel. Where the Interstate Commerce Commission issues to a motor carrier a certificate authorizing operations as a common carrier over irregular routes between specified points, or within a territory, the carrier thereby acquires a legal right to do business within the scope of its certificate. Nothing in the law limits that right in respect of the amount of business which may be done; and the Motor Carrier Act, 1935 (Section 208(a)), (49 U. S. C. 308(a)), expressly prohibits the imposition of limitations in a certificate upon the right of the carriers to add to its facilities or equipment as the development of the business and the demands of the public require.

In this case, Brady attacks an order of the Commission which requires a cessation or reduction of some of the business which Brady conducts within the territory and between the points which it is authorized to serve under a certificate issued to it by the Commission. The order stems from a decision by the Commission that Brady has operated so intensively and with such regularity pursuant to solicitation of traffic between fixed termini that it has changed its "type of operation" from that of a carrier authorized to do business over irregular routes, even though its operations do not go beyond the limits of the points, territories and highways specified in its certificate. The order is promulgated in part on the theory that such operations must be limited or restricted as a matter of policy in the interest of competing common carriers of property by

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motor vehicle who operate between the same points over regular routes.

If the order is sustained, Brady will be forced to limit the service it renders for the public in the very territory in which its certificate authorizes it to serve as a common carrier, even though the statute defines common carrier as one who holds itself out to the general public to engage in transportation for hire.

In so requiring Brady to limit its service, the report and order of the Commission do not specify what part of its business Brady must forego but it advises plaintiff "at its peril" to determine for itself the limits of its authorized services. To comply with such an order Brady has the uncertain task of determining how much business it can accept. Prudently, it must therefore accept less business than the absolute maximum limit because that limit is not specified and is unknown. To that extent Brady is compelled to forego business which would be its right to accept even if the Commission's were valid. To escape the peril entirely Brady would have to cease operation altogether.

The substantial questions presented relate to the power of the Commission in respect to the following matters:

(a) Does the Motor Carrier Act, 1935, provide or does that Act authorize the Commission to provide for two classes of common carriers of property by motor vehicle, one limited and the other unlimited as to the quantity or method of performing the services which are authorized in the certificates of public convenience and necessity issued to said carriers and specifying the points, territories, highways and commodities to be carried.

(b) Does the Motor Carrier Act, 1935, grant the Commission discretionary power to regulate or limit by classification, or otherwise, the services of common carriers of property over irregular routes for the competitive benefit of other common carriers of property

which are authorized to serve the same points over regular routes.

(c) Does Section 208(a) of the Motor Carrier Act, 1935, specifically withhold from the Commission the power sought to be exercised in its report and order.

(d) When the Commission issues an order limiting and restricting the services which a common carrier of property by motor vehicle may render in the future, said carrier being subject to special penalties for failure to obey such order, is the Commission required to make its order certain and unambiguous, or may it enter a general order which leaves the carrier to determine "at its peril" the precise limitation imposed.

(e) If the Motor Carrier Act, 1935, does grant the authority questioned in (a) above, is said act discriminatory and unconstitutional in violation of the Fifth Amendment of the Constitution.

These questions are novel in that no similar order has ever been entered by the Interstate Commerce Commission in any case involving a common carrier of property by motor vehicle. This case presents the first opportunity to secure a construction of the applicable statutes by the Supreme Court of the United States in such a case. This was a test case in the Commission. The Commission failed to consider substantial and illuminating legislative history providing answers to the foregoing questions on statutory construction; its report contains no reference to such legislative history, although the history of the legislation makes plain that the action of the Commission was contrary to the intent of Congress. The District Court wrote no opinion and expressed no view as to the legislative history which Brady called to its attention.

Since the advent in 1935 of motor carrier regulation by the Commission, repeated efforts were made to deny or cut

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down the operating rights of carriers who operated, prior to regulation, over irregular routes. Yet these operations were expressly saved by Congress in the terms of the Motor Carrier Act, 1935. In its administration of the statute, the Commission at one time sought to limit such carriers through issuance of narrowly restricted certificates, specifying the precise commodities carried before regulation and limiting the future transportation of each commodity to the particular points between which that article had previously been transported.

In the *Carolina Freight Carriers* case, cited above, the Supreme Court condemned this pulverizing of an operation in the granting of certificates based on grandfather operations. It held that the Commission must apply to carriers operating over irregular routes the same tests of substantial operation as were applied in cases involving carriers that operated over regular routes between fixed termini. The certificate issued to Brady was made to conform to that decision of the Court. See also *Howard Hall Co.* v. *United States* (1942), 315 U. S. 495, 498; *Alton R. Co.* v. *United States* (1942), 315 U. S. 15.

The present case is a revival of the effort to restrict future operations of a carrier granted a certificate over irregular routes. If successful here, it may not be doubted that similar orders will be issued against the numerous other carriers having certificates which do not specify regular routes. The end result, and the calculated purpose, of the Commission's action will be to limit future services by these carriers to the restricted repetition of pre-regulation hauls, although this is prohibited by statute and enjoined by the decision in the *Carolina Freight Carriers* case.

These are substantial questions of law upon which this District Court has ruled contrary to the plaintiff's contentions and contrary, we believe, to the construction which

the Supreme Court placed upon the statute in the *Alton, Howard Hall* and *Carolina Freight Carriers* cases.

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Of Counsel.

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APPENDIX "A"

OPINION—Filed in U. S. District Court, September 3, 1948

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION

No. 834—Civil

BRADY TRANSFER & STORAGE COMPANY, *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

IRREGULAR ROUTE COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., *Intervening Plaintiff*,

and

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., *Intervening Defendant*

Filed September 3, 1948, N. F. Reed, Clerk, by (S.) Gertrude Darrell, Deputy.

APPEARANCES:

Nuel D. Belnap (Walter, Burchmore & Belnap), Chicago, Illinois, and Rex H. Fowler (Bradshaw, Fowler, Proctor & Fairgrave), Des Moines, Iowa, attorneys for Plaintiff.

Gordon C. Locke, Washington, D. C., attorney for the Interstate Commerce Commission.

Edward Dumbauld, Special Assistant to the Attorney General, Gordon C. Locke, Washington, D. C., and Cloid I. Level, Assistant United States Attorney, Des Moines, Iowa, attorneys for the United States of America.

H. F. Gillis, Washington, D. C., attorney for Irregular Route Common Carrier Conference of the American Trucking Associations, Inc., Intervening Plaintiff.

Franklin R. Overmyer, Chicago, Illinois, and Robert J. McBride, Washington, D. C., attorneys for Regular Common Carrier Conference of the American Trucking Associations, Inc., Intervening Defendant.

Before Woodrough and Collet, Circuit Judges, and Dewey, District Judge

COLLET, *Circuit Judge*, delivered the opinion of the Court.

The Plaintiff, Brady Transfer & Storage Company, which will hereinafter be referred to as Brady, carries on extensive operations as a common carrier by motor vehicle under certificates issued by the Interstate Commerce Commission. Bray was so engaged prior to the effiective date of the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, 49 U.S.C.A. 301-327 (1947 Cumulative Annual Pocket Part). In due time after the effective date of the above Act, Brady applied to the Commission under the so-called Grandfather Clause, 49 U.S.C.A. 306(a) (1947 Cumulative Annual Pocket Part), for authority to continue the operations then engaged in Pursuant to the authority of the Act, 49 U.S.C.A. 306(a) (1947 Cumulative Annual Pocket Part), Brady continued in the prosecution of its business pending final determination of the foregoing application. Originally the applications made were for several individual certificates. Among those applications authority was requested for the right to operate as a regular route common carrier of freight over specified routes serving specified points in many states and over a large area. After several years several of such regular route certificates were issued. None of them are in controversy in this action. One of the applications that Brady originally made under the Grandfather Clause was for authority to operate as an irregular route common carrier of freight. That application requested among other things authority to operate between St. Paul and Minneapolis, Minnesota, and all points in the State of Iowa. The application was not exactly so worded but for present purposes the question at issue will be simplified by referring to it in that manner. This application had a somewhat hectic course. Originally the Commission, in 1940,

23 M.C.C. 767, issued a report in which the conclusion was stated that Brady had been operating as a common carrier of freight over an irregular route between those points and that specified area, and that the certificate should be granted on that ground. After reconsideration the Commission issued a report denying the irregular route certificate. Subsequent hearings and rehearings finally resulted in the issuance in 1944 of a certificate authorizing among other things irregular route service substantially as requested in the application. In 1937 all of Brady's certificates were consolidated into one. In the meantime, however, in 1941 the Commission instituted on its own motion an investigation to determine whether Brady was actually carrying on an operation between St. Paul and Minneapolis, Minnesota, on the one hand and Spencer and Fort Dodge, Iowa, on the other which exceeded the authority requested in its application for an irregular route between those points. After an extensive investigation by the Commission and participation in the proceedings by many interested parties, all or most of whom have intervened in the present action, the Commission issued its report stating the conclusion that Brady was not carrying on an irregular route operation within the meaning assigned to that term by the Commission and ordering him to cease and desist from exceeding the authority which he had applied for and which had been given him to operate between those points as an irregular route carrier in 1944. The report last referred to was issued in February, 1947. 47 M.C.C. 23. The effective date of this order has been extended from time to time, permitting the bringing of this action and has, since the action was brought, been further extended at the request of and for the convenience of the Court to permit the disposition of this action before the effective date of the order.

This action is brought under 28 U.S.C.A. 41(28), 43, 44, 45(a), 47, and 48, challenging the validity of the Commission's order directing Brady to cease exceeding its irregular route authority between St. Paul and Minneapolis, Minnesota, and Spencer and Fort Dodge, Iowa. The usual statutory three-judge Court was convened and the cause submitted upon the pleadings, stipulation and affidavit. The

material facts are not in dispute. Brady concedes, for the purposes of this case, that the evidence before the Commission supports its factual findings in which the operations conducted by Brady are described. Brady does not concur, however, in the conclusion of the Commission that those facts demonstrate an exercise of authority in excess of that granted and possessed by Brady under the irregular route certificate. A brief outline of the factual situation will materially clarify the legal differences now in dispute.

As heretofore noted, Brady was operating extensively as a motor carrier of freight prior to 1935. Incident to those operations occasions presumably arose, again presumably comparatively infrequent, for Brady in its capacity as a common carrier, holding itself out to the public as ready, able and willing to carry freight anywhere, for it to transport freight from St. Paul and Minneapolis to indiscriminate points in Iowa. We say "presumably" because that kind of an operation is the type of business which historically and customarily provoked the type of application which Brady filed—a request for irregular route authority between St. Paul and Minneapolis on the one hand and all points in Iowa on the other. Again, presumably, Brady was not operating between St. Paul and Minneapolis on the one hand and all points in Iowa on the other at that time or any time nor was it necessary for it to be so operating in order to justify the application for and the issuance of a certificate as an irregular route carrier. Alton Railroad Company *v.* United States, 315 U.S. 15, 21 (1942). As time went on Brady saw the opportunity of increasing materially the volume of business and the profits resulting from its operation by the establishment of regular scheduled trips, the solicitation of business between St. Paul and Minneapolis and Spencer and Fort Dodge, Iowa, the advertisement to the general public, and the solicitation of shippers upon the basis that regular scheduled daily service was offered between St. Paul and Minneapolis on the one hand and Spencer and Fort Dodge, on the other. Considerable business was built up as the result. The Commission concluded that this new systematic, regular scheduled service given by Brady between St. Poul and Minneapolis on the one hand and

Spencer and Fort Dodge on the other constituted a change in the *type* of the operation which Brady had been giving prior to 1935 and which it had requested authority to continue under the Grandfather Clause and which it had been granted authority to continue by the issuance of the irregular route certificate. That conclusion was based upon the consideration of eight factors set forth in the Commission's extensive report. 47 M.C.C. 23, 43-56 (1947). The Commission expressly disavows any intent to curtail the volume of Brady's irregular route business between these points. With equal clarity and positiveness it renounces any intent or power to curtail the number of trips which Brady makes between St. Paul or Minneapolis and Spencer or Fort Dodge under the irregular route certificate. It states in its report, (47 M.C.C. 23) (1947), in the language of the experts in that field, with a meticulous care as to terminology which we will not undertake to emulate or improve upon for the very good reason that it is not within the province of this Court to do so, why the present operations by Brady as demonstarted by the conceded facts represent a change in the *type* of its operations from those of an irregular route carrier to those of a regular route carrier.

The question of primary importance presented in this case is stated by Brady in its brief as follows:

> Does the term "irregular routes" as used by the Commission in the Brady certificate constitute a specification only of the highways which the carrier is authorized to traverse—any and all available highways—, or does it mean more and constitute a limitation on service and a prohibition of certain operating practices, so that the Commission can now require Brady to refrain from such practices on the ground that they are not authorized by the initial grant.

As amplified in the argument, this contention amounts to an assertion that the service given by Brady prior to the effective date of the Motor Carrier Act and which was made the premise of the application for the irregular route certificate under the Grandfather Clause of that Act is relevant only to the determination of the area or points which may

be served under the irregular route certificate, with the result that after the issuance of the irregular route certificate granting authority to operate between a given point or points and a specified area or points therein the quantity of such service may be increased under the authority of 49 U.S.C.A. 308(a) (1947 Cumulative Annual Pocket Part) [1] to an unlimited extent with such improvements in service as an increase in the quantity of service may make appropriate, although those refinements and improvements may convert a one-time coincidental operation between St. Paul and Minneapolis on the one hand and Spencer and Fort Dodge on the other into a regular, periodical, scheduled, systematic, "regular route" operation between those points.

The further objections to the validity of the Commission's order are advanced to the effect that (1) the Commission does not have the power to impose the limitations asserted to have been made; (2) the Motor Carrier Act does not recognize or permit the classification of common carriers of property into irregular route carriers and regular route operations; (3) the classification section of the Act, 49 U.S.C.A. 304(b) (1947 Cumulative Annual Pocket Part), does not give the Commission power to classify common carriers of property into the above classes; (4) the Commission does not have the power to restrict the service of an irregular route common carrier for the purpose of improving the competitive position of regular route carriers; and (5) the assailed order violates the due process clause of the Fifth Amendment in that it (a) is invalid for uncertainty, and (b) is discriminatory because it imposes a classification with accompanying restrictions upon irregular route operators without any reasonable relation to the purpose of the Act. These further contentions will largely be answered by the determination of the more important question above stated.

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[1] "• • • Provided, however, That no terms, conditions, or limitations (in the certificate) shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

The basic underlying dispute in this case is whether Brady has simply increased the quantity of the service it is authorized to give under its irregular route certificate or whether, as the Commission concluded, it has changed the *type* of its operation from that of an irregular route carrier to that of a regular route carrier. For it cannot be seriously contended that the Act of Congress does not contemplate two types of common carriers i. e. irregular route carriers and regular route carriers. U. S. v. Maher, 307 U. S. 148, 155; Crescent Express Lines, Inc. v. U. S., 320 U. S. 401. It is true that the cases just cited deal with the carriage of passengers but we see no valid reason why the principles announced by the Supreme Court in those cases should not apply equally to the carriers of property. Nor can there be serious doubt that Congress granted to the Commission the authority to classify common carriers of property and a fortiori the right to establish the classifications of irregular route carriers and regular route carriers, if, of course, there be a reasonable factual basis therefor, since Congress specifically conferred that power by Section 304 (b), 49 U.S.C.A. (1947 Cumulative Annual Pocket Part) as follows:

> The Commission may from time to time establish such just and reasonable classifications of groups of carriers * * * as the special nature of the services performed by such carriers * * * shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this chapter, to be observed by the carriers * * * so classified or grouped, as the Commission deems necessary or desirable in the public interest.

With the premise established that the Commission has the power to classify common carriers of property, our inquiry leads to the determination of the question of whether that power was properly exercised by the classification of common carriers of property into irregular route and regular route operators. It is reasonably clear from the Act itself that Congress recognized a necessity for dis-

tinguishing between these two *types* of operators [2] but it is apparent from the specific authorization which Congress conferred upon the Commission to classify carriers that it —the Congress—was not undertaking to actually make the classification but preferred to leave that to the considered judgment of the experts in that field.

Was the classification a reasonable one and based upon a justifiable factual difference between these classes of operators? The answer to that question depends somewhat upon a consideration of what has historically been the manner of operation of an irregular route carrier and regu-

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[2] 49 U.S.C.A. 303(a)(14) "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, *whether over regular or irregular routes*, except * * *" (Emphasis supplied).

49 U.S.C.A. 304(b) quoted *supra* in the body of this opinion.

49 U.S.C.A. 306(a) "Except as otherwise provided in this section and in section 310a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 310, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, *over the route or routes or within the territory for which application is made and has so operated since that time*, Or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, * * *" (Emphasis supplied).

49 U.S.C.A. 308(a) "Any certificate issued under section 306 or 307 shall specify *the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate;* and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under Section 304(a)(1) and (6): * * *" (Emphasis supplied).

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lar route carriers prior to the passage of the Motor Carrier Act of 1935 and at the time the Commission made its classification of those carriers by general order in 1937.[3] The distinguishing characteristics between the irregular route carrier and one possessing regular route authority were not stated with meticulous nicety in the classification order of 1937, and apparently not until the present case was decided by the Interstate Commerce Commission did that body undertake to set out any extensive formula for making the distinction between the types. And then it disavowed, and we think very properly, the intention or even the possibility of laying down any hard and fast inelastic yardstick which could be applied to all cases for the determination of what class a particular operation fell into. It did in its report in this case announce eight factors or criteria, some or all of which might in an individual case exist and have a relevant bearing on the determination of the type of operation. It is clear from the Commission's order that there was no intention to assert that any one of those eight factors would necessarily be controlling. On the other hand, it is equally clear that the Commission was undertaking to give such assistance as it could to the industry in announcing these factors in order that so many of them as might exist in any given case might be considered collectively in determining the type of operation. It is unnecesary to restate these factors in detail. The salient portions thereof are set forth in the margin.[4] They do not constitute any new

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[3] Classification of Motor Carriers of Property, 2 M.C.C. 703 (1937).

[4] "*Predetermined plan.*—Regular-route operation when once established is repetitive in character and in its over-all aspects is essentially operation according to a predetermined plan as contrasted with operation strictly on-call, as demanded and where demanded. This does not, however, mean that the plan in all its details must have been considered before the operation was herein. On the contrary, as already indicated, it is frequently the result of an evolutionary process. The significant thing is that from day to day and week to week the pattern of a regular-route operation is fixed to a degree inconsistent with a bona fide on-call anywhere-for-hire service."

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"*Character of Traffic.*—Irregular-route call-or-demand carriers are all classified in some States as contract or private carriers, rather than as

definition of an irregular route carrier, but merely enunciate the historically established differences in the type of operations long known and recognized by the industry and by Brady at the time it made original application for different types of certificates. The general criteria which the Commission has laid down as a basis for the classification of common carriers by type are in our judgment based upon abundant factual premises stated in the factors themselves. We conclude, therefore, that the classification was a reasonable one fully authorized by well recognized principles of law and the Act in question. Brady concedes the correctness of the facts found by the Commission and set forth in

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common carriers, because normally they cater to fewer shippers and respond only to calls for the movement of truckload lots or other substantial shipments. In contrast commmon carriers operating according to a predetermined plan over regular routes between commercial centers or from distribution points into consuming areas are the logical carriers of aggregated lots of miscellaneous less-than-truckload shipments, and regularly serve a great number of shippers. Thus the consistent day to day transportation in volume of aggregated lots of numerous less-than-truckload shipments is more a characteristic of regular route, than of irregular route, carriers. This is true notwithstanding the fact that irregular-route carriers, who operate to and from a recognized base area, frequently solicit and accept less-than-truckload shipments particularly in making up return loads."

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"*Solicitation.*—The greater acceptability of less-than-truckload shipments to regular-route, than to irregular-route, carriers, just discussed, and the dependency of the former on a constant and continuing volume of traffic reflects itself in solicitation by regular-route carriers which differs from that generally indulged by those who operate over irregular-routes. The solicitation of the latter is generally less intense and as a rule more selective. Such carriers do not try to reach the same number of shippers as do regular-route carriers. Thus employment at the principal points served of one or more full-time solicitors whose duty it is regularly to call upon as many shippers as possible for the purpose of soliciting shipments both less-than-truckload and truckload is more characteristic of regular—than irregular-route carriers."

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"*Terminals and call stations.*—Although the maintenance by an irregular-route carrier of a terminal or terminals at points other than its principal base is permissible under the act, *J. Miller Co. Common Carrier Application,* 42 M.C.C. 709, many such carriers maintain no terminals at points

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its report and order but contends that actually all of the factors considered by the Commission in reaching its conclusion that Brady had changed the type of its operation were factors originating out of an increase in the *quantity* of its operation, as distinguished from *type*, and hence the application of those factors is prohibited by the limiting provisions of 49 U. S. C. A. 308(a) (1947 Cumulative Annual Pocket Part) heretofore quoted in footnote 1 supra. With that contention we cannot agree. It is unnecessary in view of the careful and full consideration given to the question by the Commission and reported in its report and order, for us to amplify at length the difference in the type of

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other than their respective bases and have no representation and no telephone listing except at such bases. Some of them using the telephone number of some non-competitive carrier, gasoline service station, or similar establishment, arrange a telephone listing in their own name and so establish a so-called call station at which requests for service may be left. Regular-route carriers, on the other hand, if their operations are at all substantial, find the maintenance, at the principal points served, of terminals at which less-than-truckload shipments may be assembled, sorted, and loaded into line-haul equipment, a virtual necessity. Unquestionably the maintenance of terminals at a point other than the carrier's base coupled with the consistent movement of a substantial volume of less-than-truckload shipments, strongly suggests an operation of fixed regularity and according to plan rather than call-on-demand."

* * * * * * *

"*Fixed routes.*—The adherence to fixed routes is, of course, the outstanding characteristic of regular-route carriers, but this does not mean that rigid and inflexible use of a particular route or routes is imperative to the status of a regular-route carrier. Recognizing this, the Congress in section 208(b) of the act specifically provided that a common carrier 'may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate * * * under such rules as the Commission may prescribe.' As already indicated, many regular-route services are the outgrowth of irregular-route operations which have gravitated in the channels of the greatest traffic. In the course of such evolution, a regular-route service is achieved, if its other elements are present, when the use of a particular route or routes becomes habitual and customary even though departures therefrom are freely made whenever to the carrier's advantage. This does not, however, mean that the habitual and frequent, even daily, use of a particular route between certain points by a carrier authorized to operate only over irregular routes is necessarily unlawful. Such considerations as the geographic situation, the length of the route, other available routes, the character of the traffic,

operation which the Commission found Brady was now engaging in from the type of operation which it was performing prior to June 1, 1935, which was made the basis for its application for the irregular route certificate under the Grandfather Clause and which was the premise for the issuance of that authority. We deem it adequate to observe that there is, as the Commission found, a clear distinction in type between the indiscriminate coincidental, nonscheduled, unperiodical, itinerant, ambulatory service of an irregular route carrier and the operation of a regular route certificate holder over a carefully specified route to only

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the number of shippers served, and possibly others would affect the conclusion. Although they are definitely the exception rather than the rule, it is easy to conceive of a bona fide irregular-route carrier being engaged primarily in the daily transportation of the products of a particular plant which is so located as to require the repeated use of certain routes. Or such a carrier may be engaged in interplant operations for a single shipper such that economy of operation and expedition dictate the regular use of certain highways. In such instances the existence of a regular-route operation, as that term is used in certificates or permits issued under Part II of the act, is clearly negatived by other considerations which outweigh the repeated use of the same routes."

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"*Fixed termini.*—Fixed termini go with fixed (regular) routes and necessarily characterize every regular-route operation. That they may also in exceptional cases mark bona fide irregular-route operations is apparent from the immediately preceding discussion but, notwithstanding, it is clear that when the regular—or irregular—route status of a particular operation is in issue the fact that it is between fixed termini is particularly significant. This is especially true where, as here, the considered termini are widely separated, where a variety of routes are available between them, and where adherence to a particular route has not been without exception."

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"*Periodicity of service.*—As above stated, regular-route service is repetitive in character. It is necessarily marked by such periodic recurrence, as to become fixed in a pattern which is known to the public in contrast to on-call service which depends for its design wholly on the day to day needs of individual shippers. Regular-route service does not, however, depend upon the interval between offerings. Daily service is common but not necessarily the rule. Not infrequently regular-route 'grandfather' rights have been granted on proof of only two or three services weekly over claimed routes. The essential thing is a service of such fixed and definite periodicity that it becomes known to and is relied upon by shippers and consignees generally. Where, however, daily service is shown it is

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specifically authorized points on that route on schedules published and filed, with the obligation on the part of the carrier to give, and the responsibility on the part of the Commission to compel, the carrying out of that operation to such an extent as the convenience and necessity of the public justified. The decision reached by the Commission to the effect that Brady's systematically, periodically, scheduled, non-coincidental, premeditated, planned, regular service between St. Paul and Minneapolis on the one hand and Spencer and Fort Dodge on the other was a regular

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obvious that it is strong evidence of a regular-route operation. A continuing course of daily service for a long time between specific points over substantially the same routes is not likely to be achieved in a bona fide on-call operation without any predetermined plan."

• • • • • • •

"Schedules or their equivalent.—The strict observance of a fixed published schedule of departures and arrivals, regardless of the available traffic, though the accepted practice of regular-route common carriers of passengers, is the ultimate in regular-route service by motor carriers of property, which is not achieved by more than a few. On the other hand, practices in the matter of tendering shipments and the preference of consignees for early morning deliveries tends to fix upon carriers, who regularly serve numerous shippers at merchandise distributing centers, a pattern of departures and arrivals which is characteristic of regular-route operators to a far greater degree than in the case of those who operate strictly on-call and over irregular routes. Like the respondent here, such regular-route carriers are engaged during the day in assembling and sorting less-than-truckload shipments preparatory to the loading of line-haul equipment. Normally all pick-ups are completed by late afternoon or early evening. As soon thereafter as practicable, line-haul equipment is loaded and dispatched, with a view to deliveries the next morning as soon as possible after the opening of business. Occasionally the early receipt of shipments for certain points aggregating more than a truckload permits the dispatching of a line-haul truck earlier than the usual hour. On other occasions the shipments received on a given day may be so slight that they are held over for the succeeding day to avoid operation of line-haul equipment too lightly loaded. Generally, however, regular-route operations of motor carriers of miscellaneous less-than-truckload freight are marked by a regularity in the arrival and departures of equipment, which is not characteristic of carriers operating only on-call and over irregular routes. Although more flexible, such customary arrival and departure times are the equivalent of the published schedules observed by passenger carriers generally and serve to emphasize the periodicity which identifies a regular-route service."

47 M.C.C. 23, 43-56 (1947).

route operation, was justified by the conceded facts. To hold otherwise would, in effect, amount to an authorization by the holder of an irregular route certificate, authorizing service between St. Paul and Minneapolis on the one hand and all points in Iowa on the other, to establish regular route operation between St. Paul and Minneapolis and each and every point in Iowa without any finding that such service was necessary or convenient to the public or without any finding that such service had ever at any time been given between two specific points. Such type of service is not that authorized by an irregular route certificate.

The contention that the Commission has restricted the service of this irregular route carrier for the purpose of improving the competitive position of regular route common carriers between the points involved is without merit. There is no indication in the order that such was the proximate ground for the Commission's cease and desist order.[5] It is

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[5] "ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 3rd day of February, A. D. 1947.

No. MC-C-246

Transportation Activities of Brady Transfer and Storage Company

It appearing, That by an order dated February 4, 1941, the Commission, division 5, on its own motion, entered upon an investigation into and concerning the lawfulness of certain motor common carrier operations of Brady Transfer and Storage Company of Fort Dodge, Iowa;

And it further appearing, That a full investigation of the matters and things involved in such proceeding has been made, and that the said division, on the date hereof, has made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That the respondent be, and it is hereby, notified and required to cease and desist, on or before April 9, 1947, from the motor carrier operations which it is found in said report now to be conducting without appropriate authority from this Commission, and to abstain from a resumption of such operations, until appropriate authority therefor has been obtained from this Commission, and that this proceeding be discontinued.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(Seal)"

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clear that this order was made because of a finding, which we have heretofore concluded to be justified, that Brady was exceeding the authority of its irregular route certificate. If the result of the order may incidentally be to the advantage of other carriers operating between these points, then it is a result contemplated by the law and therefore not based upon any sinister or improper ground.

Is the order invalid for uncertainty? Brady contends that it is because it simply orders it to cease and desist from exceeding its authority without informing it with definiteness and certainty just what it can do under its irregular route certificate without becoming a regular route carrier and thereby exceeding the authority it holds. As heretofore noted, the Commission has gone to considerable lengths in advising Brady and other carriers of what factors may be relevant to a determination by the carrier of its rights under an irregular route certificate. It cannot, as heretofore observed, lay down any hard and fast inelastic rule by which every case can be automatically determined. The order is sufficiently definite and certain that it is not invalid for want thereof.

There remains the contention that the order is discriminatory because it imposes the classification of an irregular route carrier upon Brady with accompanying restrictions without any reasonable relation to the purpose of the Act. This contention has been answered by what has been said heretofore.

It may with propriety, however, be added that the Act of Congress contemplated that its administration should be primarily in the interest of the public convenience and necessity. Such being at least one of the purposes of the Act, it cannot reasonably be held that the limitation which the Commission stated in the irregular route certificate, to the effect that the holder thereof should not operate as a regular route operator, was not in the interest of public convenience and necessity. One of the underlying principles of regulation of utilities generally is that when the sovereignty assumes the power of regulation and requires the service and type of service which the regulatory authorities determine to be necessary and convenient in the public in-

terest then some measure of protection against indiscriminate and uncontrolled competition must be provided.

The injunction will be denied and the complaint dismissed on the merits.

(S.) JOSEPH W. WOODROUGH,
United States Circuit Judge.
(S.) J. C. COLLET,
United States Circuit Judge.
(S.) CHAS. A. DEWEY,
United States District Judge.

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APPENDIX "B"

Finding of Fact and Conclusions of Law Filed in U. S. District Court, September 3, 1948

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION.

No. 834—Civil

Filed September 3, 1948. N. F. Reed, Clerk, by (S.) Gertrude Darrell, Deputy

BRADY TRANSFER & STORAGE COMPANY, *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

IRREGULAR ROUTE COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., *Intervening Plaintiff*,

and

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., *Intervening Defendant*

Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1

Jurisdictional Facts

This action is brought by Brady Transfer and Storage Company to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission directing it to cease and desist from exceeding the limits of its authorization in one of its irregular route certificates. The plaintiff's principal office and place of business is at Fort

Dodge, Iowa, and it is engaged in the transportation of interstate commerce between points in various states, including points in the Southern District of Iowa as a common carrier by motor vehicle subject to Part II of the Interstate Commerce Act under various certificates of convenience and necessity issued by the Commission among which is a certificate authorizing it to perform services as an irregular route common carrier by motor vehicle between St. Paul and Minneapolis, Minnesota, and all points in Iowa, including Spencer and Fort Dodge.[6]

Jurisdiction of this, a statutory three-judge Court, is conferred by the Urgent Deficiencies Act of October 22, 1913, 38 Statutes at Large 219; 28 U. S. C. A. 41 (28).

2

The Interstate Commerce Commission, after an investigation and hearing, found that the plaintiff was exceeding the authority of its irregular route certificate in so far as its operations thereunder between St. Paul and Minneapolis on the one hand and Spencer and Fort Dodge on the other were concerned, and ordered plaintiff to cease and desist from continuing to exceed that authority.

3

The Commission's order was based upon the factual premise that the plaintiff, Brady, had prior to June 1, 1935, performed occasional operations from St. Paul and Minneapolis to indiscriminate points in the area comprising the State of Iowa. The application to the Commission for authority to continue that type of operation under the so-called Grandfather Clause of the Motor Carrier Act of 1935 was predicated upon the same factual basis. The irregular route certificate issued to and held by plaintiff does not

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[6] The route in question is described in the certificate No. MC 52110, Sheet No. 4 as follows:

"IRREGULAR ROUTES:

General commodities as specified above,

Between the following points and places: all points and places in Iowa, * * * Minneapolis * * * St. Paul, Minn., * * *"

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limit the quantity or volume of business conducted under authority of that certificate nor the frequency of operations between points or areas specified in that certificate. It does limit the *type* of operation under that certificate to the *type* of operation classified by the Commission as that of an irregular route operator.

4

The plaintiff continued its operation under authority of the Act pending the determination of its application for the irregular route certificate. Its operation as originally conducted and as it was conducted at the time of the application for the irregular route certificate was coincidental with the requests of individual shippers and not on a periodical, scheduled, predetermined plant of operation.

5

Thereafter the plaintiff changed the foregoing type of its operation to that of a scheduled, periodical, planned, advertised, solicited service between St. Paul and Minneapolis and Spencer and Fort Dodge, giving daily service over the same route.

6

The facts found by the Commission in its report are, for the purposes of this case, conceded. Those facts as incorporated in the Commission's order are by reference incorporated herein as the Court's formal findings of fact.

CONCLUSIONS OF LAW

1

The Court has jurisdiction of the parties and of the subject matter.

2

The order of the Commission is not patently oppressive or unreasonable and is supported by the requisite facts.

3

The Commission has authority to classify common carriers of property by motor vehicle into regular and irreg-

ular route carriers. 49 U. S. C. A. 303(a) (14), 304(b), 306(a) (1947 Cumulative Annual Pocket Part).

4

The classification of said common carriers into regular and irregular route carriers was made by the Commission. Classification of Motor Carriers of Property, 2 M.C.C. 703 (1937).

5

Said classification is not unreasonable nor patently oppressive and has factual support in the conditions in the industry and the evidence in the record before the Commission.

6

As admitted by the plaintiff, the Commission's finding that it had changed its service between St. Paul and Minneapolis, Minnesota, on the one hand and Spencer and Fort Dodge, Iowa, on the other into regular route service is supported by substantial evidence.

7

The order of the Commission is not invalid for want of certainty.

8

The affidavit offered by the plaintiff in evidence at the time of the hearing of this cause and which was received subject to objection has been received in evidence and considered in so far as such affidavit is material and relevant to the issues in this case.

9

The complaint should be dismissed on the merits.

(S.) JOSEPH W. WOODROUGH,
United States Circuit Judge.
(S.) J. C. COLLET,
United States Circuit Judge.
(S.) CHAS. A. DEWEY,
United States District Judge.

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